No. 8981

IN THE

United States
Circuit Court of Appeals
For the Ninth Circuit

E. H. SMITH, D. N. McBRIER, F. B. McBRIER, ALICE M. BETHEL, CHARLES A. OWEN, MORRIS K. RODMAN AND ETHEL W. JOHNSTON, for themselves and others similarly situated, *Appellants,*

vs.

BOISE CITY, a Municipal Corporation, and THOMAS F. RODGERS, as City Treasurer of said Boise City, *Appellees.*

APPELLANTS' BRIEF

On Appeal from District Court of the United States for District of Idaho, Southern Division.

RICHARDS & HAGA,
Attorneys for Appellants,
Residence: Boise, Idaho.

SYMS-YORK CO., PRINTERS & BINDERS, BOISE

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STATEMENT AS TO JURISDICTION ON APPEAL

May It Please the Court:

Appellants, in support of the jurisdiction of this Court to review the above entitled cause on appeal, respectfully represent:

STATUTORY PROVISIONS SUSTAINING JURISDICTION:

This Court has jurisdiction of the appeal under Sec. 128, Judicial Code as amended (Title 28, Sec. 225, U.S.C.).

Diversity of citizenship is alleged in the complaint (R. 12) and admitted by the answer (R. 29).

APPEAL WAS TAKEN IN TIME:

Decree dated and filed April 23, 1938 (R. 63).

Appeal allowed July 15, 1938 (R. 97).

JURISDICTIONAL AMOUNT IS INVOLVED:

Suit in equity for accounting and money judgment (R. 23-25).

Amount in controversy, $37,000 (R. 15, 29).

Judgment for $6,846.17 (R. 63-4).

STATEMENT OF THE CASE

Appellants are the owners of $27,500, par value, of bonds issued by Boise City for improvements in Local Sidewalk and Curb Improvement District No. 38. The suit was brought on behalf of appellants and all others similarly situated. The amount of bonds issued for said Improvement District aggregated $56,539.10 (R. 55-57), of which bonds numbered 1 to 39, inclusive, of the par value of $19,539.10 were redeemed before maturity, at par and accrued interest (R. 59), leaving a balance still outstanding of $37,000, of which, as stated above, $27,500 are held by appellants and the balance of $9,500 by parties whose names and addresses are unknown to either appellants or appellees.

The bonds bear date of January 1, 1922 (R. 25-28),

and were payable on or before January 1, 1932; interest 7% per annum, which was paid to January 1, 1932.

Appellants presented their bonds for payment to the City Treasurer who refused payment thereof because there was only $2,817.57 in the fund in his custody available for the payment of the bonds and interest (R. 15, 29).

Appellants brought suit in equity for an accounting by the city as statutory trustee for the bondholders. The complaint alleges in considerable detail negligence and carelessness and wrongful acts on the part of the officers of Boise City, in the levying of the assessments for the payment of the bonds, in the collection of the assessments, in the certification of the assessments to the county after the same became delinquent, and in the misappropriation and diversion of the assessments collected.

Among other things it is alleged that for a period approximating 10 years the City Clerk had diverted and appropriated to her own account over $92,000 of the funds of the city, including over $21,000 of the assessments collected for the payment of appellants' bonds (R. 16-17); that Boise City had permitted its books and records to be kept in an inadequate and inefficient manner by negligent, incompetent and untrustworthy employees; and that the system of accounting employed by the city was wholly inadequate for the protection of the funds which the city held in trust for appellants and other bondholders; that the amount which the trustee had collected under the assessments levied for the payment of appellants' bonds, and the condition of the assessments, delinquencies,

etc., could not be ascertained or determined without an accounting being rendered by the city as statutory trustee (R. 22-23); that the city had wrongfully paid the holders of bonds numbered 1 to 39, inclusive, the full or face amount of their bonds, which was greatly in excess of the pro rata or equitable share of the moneys collected and that can be collected for the payment of all of said bonds; that the officers of the city knew, or should have known, of the wrongful acts complained of; that the city had compromised for $14,500 its claim against the sureties on the City Clerk's bond, but had not placed any of the moneys received on such settlement in the fund for the payment of appellants' bonds (R. 17-22); that the city should be held liable for the loss resulting to the bondholders from the careless, negligent and wrongful acts of the city and its officers.

And appellants accordingly prayed judgment against the city for any deficiency there might be in the fund for the payment of the bonds issued on account of said Improvement District.

The sufficiency of the complaint, and the right of appellants to an accounting, were determined by the District Court on appellees' motion to dismiss. That decision is reported in 18 F. Supp. 385.

After answer filed (R. 29-36) and no account being rendered by the city, the Court on appellants' motion (R. 37) ordered that an account be furnished (R. 38-39).

Pursuant to that order appellees filed what they designated "First Report and Account" (R. 79-84).

The report was incomplete and inadequate and not

in compliance with the Court's order, and appellants therefore moved for a further report (R. 40).

Whereupon appellees' filed what they designated "Supplemental Report and Account" (R. 84-90), to which appellants again objected and requested a further and more complete report (R. 41-42).

Appelles then filed what they designated their "Second Supplemental Report and Account" (R. 90-94), to which appellants again objected and requested a further report (R. 43).

In view of the apparent impossibility of obtaining a complete accounting, appellants proceeded with the trial of the case, after which the Court rendered its opinion on the merits (R. 44-54), and thereupon findings of fact and conclusions of law were made and filed (R. 54-63), and decree entered (R. 63-65) giving appellants judgment for $6,846.17, the same to be prorated over all bonds outstanding—$37,000.

In brief, appellants contend:

(a) That the burden of proof was on Boise City as statutory trustee to show that it had discharged the duties of trustee according to law; that it was liable for all funds for which it could not properly account, and for all losses resulting from the improper performance of its duties; that it failed wholly to sustain the burden of proof which the law of accounting places on a trustee; that the Trial Court proceeded on the assumption that the burden was on appellants to show the city's failure to properly perform its duties and conserve the trust funds, and the losses resulting therefrom;

(b) That as to funds wrongfully diverted and not placed in the trust fund as and when the same should have been placed therein, the city should pay interest at the legal rate—6%;

(c) That if judgment be not entered against the city *for the full amount due appellants,* then the city should be required to reimburse the trust fund, by the amount which it overpaid the holders of the first 39 bonds which were paid in full when it was obvious that there would be a deficit and that other bondholders would not receive the full amount due them. This would require the city to reimburse the trust fund by about $10,420.

SPECIFICATION OF ERRORS

The assignment of errors sets out in some detail a number of errors (R. 98-100). In brief, they are:

I

That appellants were entitled to judgment for the full amount of bonds outstanding with interest at the rate of 7% per annum from January 1, 1932, because appellees failed to show by the accounts rendered that the losses in the trust fund were not caused by the negligence, carelessness or wrongful acts of the city or its officers; or stated otherwise, where a trustee has kept his accounts in such a negligent and careless manner that he is unable to show that he has properly performed his duties and complied with the law relating thereto, the presumption will be against the trustee on settlement, and he will be charged with what he can not account for.

II

Sec. 49-2725, Idaho Code Annotated, 1932, provides that the bonds issued for said Improvement District "shall be equal liens upon the property for the assessments represented by such bonds without priority of one over another to the extent of the several assessments against the several lots and parcels of land."

The security was accordingly held for the equal and pro rata benefit of all bonds; hence, when the city paid bonds numbered 1 to 39, inclusive, aggregating $19,539.10, in full with accrued interest, and the security then remaining was sufficient to pay only about 18½ per cent of the face value of the remaining bonds, without interest after January 1, 1932, it violated its obligations to the holders of the bonds not redeemed. By its actions it wrongfully diverted and applied their security to the holders of the bonds that were redeemed and paid in full. Had the security been prorated as required by statute, appellants would have received 46⅔ per cent of the face of their bonds instead of 18½ per cent. This wrongful act on the part of the city results in a loss to appellants and the holders of the other outstanding bonds of fully $10,420. Unless the city be required to pay all bonds in full the judgment should, in any event, be increased by the amount of $10,420.

III

The Court also failed to allow appellants interest on the money which the city or its officers had wrongfully diverted or withheld from the trust fund. On the basis of the judgment of the District Court, appellants should have had interest on over $4,000 for more than five years.

SUMMARY OF THE ARGUMENT

Liable for Defalcation of Officers

1. A municipal corporation in Idaho, in making improvements for the payment of which special assessment bonds are issued, acts in its proprietary capacity, and the rule applicable to private trustees applies to the city and renders it responsible for defalcations and wrongdoings of its agents and officers.

Cruzen vs. Boise City, 58 Idaho ...., 74 Pac. (2d) 1037, 1038.

Smith vs. Boise City, 18 F. Supp. 385.

Appellees Required to Render Account

2. A municipal corporation, acting as statutory trustee, may be required to account as any other trustee, and it is bound to the exercise of due diligence in collecting according to law and enforcing the statutory remedies intended for the benefit of the bondholders through the machinery which the law has created for such purpose. It is the agent of the owners of the bonds, and answerable for failure to perform its duty.

Jewell vs. City of Superior (C.C.A. 7), 135 Fed. 19.

Board of Education vs. Norfolk & Western Ry. Co. (C.C.A. 7), 88 Fed. (2d) 462.

Rothschild vs. Village of Calumet Park, 350 Ill. 330, 183 N.E. 337.

Spydell vs. Johnson, 128 Ind. 235, 25 N.E. 889.

Hayden vs. Douglas County (C.C.A. 7), 170 Fed. 24.

New Orleans vs. Fisher, 189 U.S. 185, 45. L. Ed. 485.

New Orleans vs. Warner, 175 U.S. 120, 44 L. Ed. 96.

Hauge vs. City of Des Moines, 207 Iowa 1207, 224 N.W. 520.

Boise City Is Liable for Losses Resulting From Its Negligence.

3. When a municipal corporation, having authority to make special improvements and to provide for the payment thereof out of special assessments, fails to levy the necessary assessments, or misappropriates or diverts the funds to other purposes, or otherwise so performs its duty that a loss results to the bondholders, the corporation becomes primarily liable to pay the debt.

Oklahoma City vs. Orthwein (C.C.A. 8), 258 Fed. 190, 195.

City of McLaughlin vs. Turgeon (C.C.A. 8), 75 Fed. (2d) 402, 410.

Gray vs. City of Santa Fe (C.C.A. 10), 89 Fed. (2d) 406.

Masters vs. Rainier, 238 Fed. 827.

Asphalt Paving Co. vs. Denver (C.C.A. 8), 72 Fed. 336.

District of Columbia vs. Lyon, 161 U.S. 200, 40 L. Ed. 670.

Rogers vs. Omaha, 82 Neb. 118, 117 N.W. 119.

North Pac. Lumbering & Mfg. Co. vs. East Portland, 14 Ore. 3, 12 Pac. 4.

Com. Nat'l Bank vs. Portland, 24 Ore. 188, 33 Pac. 532.

Dime Deposit & Disc. Bank vs. Scranton, 208 Penn. 383, 57 Atl. 770.

Dale vs. Scranton, 231 Penn. 604, 80 Atl. 1110.

Denny vs. City of Spokane (C.C.A. 9), 79 Fed. 719.

Blackford vs. Libby, 103 Mont. 272, 62 Pac. (2d) 216.

4. Principles of justice and honesty fundamentally apply to individuals, municipalities, states and nation alike, and should be applied alike, unless constitutional and statutory provisions forbid. The great weight of authority holds the city liable for losses sustained through neglect or refusal to levy assessments and perform the duties imposed upon it in connection with the collection and safekeeping and lawful distribution of the moneys to the borrowers.

Henning vs. City of Casper, 50 Wyo. 1, 57 Pac. (2d) 1264, and authorities there cited.

Ward vs. City of Lincoln, 87 Neb. 661; 128 N.W. 24; 32 L.R.A. (N.S.) 163, and note.

5. The county treasurer is the agent of the city for the collection of special taxes, and it is the duty of the city to obtain from its agent the funds collected and to report what its agent has done to enforce collection of the assessments levied.

Hauge vs. City of Des Moines, 207 Iowa 1207, 224 N.W. 520.

Hauge vs. City of Des Moines (Iowa), 216 N.W. 689.

6. Sec. 49-2719, Idaho Code Annotated 1932, provides that the city "shall levy a special assessment each year sufficient to redeem the instalment of such bonds next thereafter maturing, but in computing the amount of special assessments thereby levied against each piece of property liable therefor, the interest due on said bonds at the maturity of the next instalment shall be included."

Appellees' report and account shows that the city levied for interest $21,750.25 (R. 79), and that it paid out as interest on bonds (R. 80) $31,932.88, and hence there was a deficit in the amount levied for interest of over $10,000.

Trustee Has Burden of Proof.

7. The burden of proof was on the city as statutory trustee to show that it had discharged the duties of the trust according to law and the rules governing trusteeships. It is liable for all funds for which it can not properly account and for all losses resulting from the improper performance of its duties, and all presumptions are resolved in favor of the beneficiaries.

65 C.J., page 904.

3 Pomeroy's Equity Jurisprudence, 4th ed., Sec. 1063.

Lupton vs. White, 15 Ves. 432.

4 Bogert on Trusts and Trustees, Secs. 962 and 963.

"The trustee is under a duty to the beneficiary to keep and render clear and accurate accounts with respect to the administration of the trust. * * * If the trustee fails to keep proper accounts, he is liable for any loss or expense resulting from his failure to keep proper accounts. The burden of proof is upon the trustee to show that he is entitled to the credits he claims, and his failure to keep proper accounts and vouchers may result in his failure to establish the credits he claims."

Vol. 1, Restatement of the Law on Trusts, Secs. 172 and 173.

Bone vs. Hayes, 154 Cal. 759, 99 Pac. 172.

Purdy vs. Johnson, 174 Cal. 521, 163 Pac. 893.

When Improvement District or Fund is Insolvent, Pro rata Payment Must Be Made to Bondholders

8. The assessments levied for the payment of improvement bonds and interest thereon are for the equal benefit of all bondholders, and the city can not legally pay the bonds in numerical order when it appears that the fund is or will be insufficient to pay all bonds in full. When insolvency appears the city must make payment pro rata on all bonds, otherwise it will be liable for the excess paid to any bondholder.

Sec. 49-2725, Idaho Code Annotated 1932.

Meyers vs. Idaho Falls, 52 Idaho 81, 11 Pac. (2d) 626.

Jewell vs. City of Superior (C.C.A. 7), 135 Fed. 19.

Board of Education vs. Norfolk & Western Ry. Co. (C.C.A. 7), 88 Fed. (2d) 462.

Howard vs. State, 226 Ala. 215, 146 So. 414, 419.

State vs. Little River Drainage Dist., 334 Mo. 753, 68 S.W. (2d) 671, 674.

State vs. Duncan, 334 Mo. 733, 68 S.W. (2d) 679, 683.

Morris, Mather & Co. vs. Port of Astoria, 141 Ore. 251, 15 Pac. (2d) 385.

6 McQuillin on Municipal Corporations, Sec. 2504, page 275.

Rothschild vs. Calumet Park, 350 Ill. 330, 183 N.E. 337.

1 Pomeroy's Equity Jurisprudence, 4th ed., Secs. 405-407.

Kerr Glass Mfg. Corp. vs. City of San Buenaventura, ... Cal. ....., 62 Pac. (2d) 583, 588.

Morris vs. Gibson, ... Cal. App. ....., 65 Pac. (2d) 956.

9. The rule is well settled that where the bonds are payable out of a fund based on an inexhaustible power of taxation under which the fund may be replenished by the further exercise of the power of taxation, neither law nor equity requires pro rata payment, even though the current fund is insufficient to pay the matured bonds and coupons. But where the bonds are payble out of a fund to be created under a limited or exhaustible power of taxation, the rule is otherwise, and when insolvency of the fund appears equity requires equality and pro rata payment.

Kerr Glass Mfg. Corp. vs. City of San Buenaventura, ...Cal. ....., 62 Pac. (2d) 583, 588.

Morris vs. Gibson, ... Cal. App. ....., 65 Pac. (2d) 956.

1 Jones on Bonds and Bond Securities, Sec. 511.

Rohwer vs. Gibson, 126 Cal. App. 707, 14 Pac. (2d) 1051.

Jewell vs. Superior (C.C.A. 7), 135 Fed. 19.

Snower vs. Hope Drainage Dist., 2 Fed. Supp. 931.

State vs. Little River Drainage Dist., 334 Mo. 753, 68 S.W. (2d) 671, 674.

The City Was Trustee Under an Active Trust

10. The trusteeship under which the city acted was an active trust as distinguished from a dry or passive trust, and it was its duty to be watchful of the interest of the beneficiaries and to observe the condition of the trust fund, and when the insolvency of the fund or the insufficiency of the assessments appeared, it was the trustee's duty to invoke the rule of pro rata payment, as in the case of private bonds.

Welch vs. Northern Bank and Trust Co., *100* Wash, *349*, 170 Pac. 1029.

1 Restatement of the Law on Trusts, Sec. 69a.

Interest on Funds Diverted

11. The city is liable for the payment of interest on

the wrongful diversion of trust funds from the time of such diversion, at the legal rate.

Cook vs. Staunton, 295 Ill. App. 111, 14 N.E. (2d) 696, 701.

Conway vs. City of Chicago, 237 Ill. 128, 86 N.E. 619.

Right of Bondholders to Foreclose is an Impracticable Remedy and Optional with Bondholders

12. Bondholders' right to foreclose assessments is optional and for bondholders' benefit, and failure to foreclose does not bar remedy against city for its wrongful act or neglect. The exercise of the remedy of foreclosure by one of a large number of bondholders is wholly impracticable. All bondholders have a proportional lien upon each separate piece and parcel, and their rights can not be foreclosed out by any one bondholder.

ARGUMENT

I

Issues Definitely Settled By Trial Court

The District Court held in its first opinion in this case, reported in 18 F. Supp. 385, that Boise City was statutory trustee for appellants. The Supreme Court of the state in a parallel case (Cruzen vs. Boise City, 58 Idaho ....., 74 Pac. (2d) 1037), decided shortly thereafter cited with approval the decision of the

District Court in the case at bar in support of the proposition "that the city is liable for the collection of the assessments, and that the general rule applicable to a private trust would apply, resulting in the responsibility of the trustee for the defalcation of his agent," and held the city liable to a bondholder of an improvement district, for wrongful diversion of of funds by the City Clerk.

We think the law is therefore settled in the State of Idaho that Boise City was statutory trustee and that it is liable for any violation of the law governing its trusteeship which results in a loss to the beneficiaries under the trust. Such was the holding of the District Court, and from that decision no appeal was taken by the city. The decision is fully sustained by the authorities cited under paragraph 3 of our "Summary of the Argument."

The District Court directed the city to render an account of its trusteeship for the reasons stated in the opinion. That decision is amply sustained by the authorities cited under paragraph 2 of our "Summary of the Argument." From that decision the city has not appealed.

These issues, originally contested by appellees, have accordingly been settled in favor of appellants and are not subject to review on this appeal.

II

Appellees Furnished Only an Incomplete, Partial and Fragmentary Account

The account, if it had been submitted with the full-

ness required, would have included a multitude of items covering transactions extending over a period of about 16 years—1922 to 1938. It should have contained the information necessary to enable the city officials and bondholders to determine therefrom the levies that had been made, the steps taken to collect, the amount collected and the application thereof, the amount paid and the amount still unpaid and delinquent, and the status of the delinquency on each piece and parcel of land in this improvement district, and what pieces and parcels had been sold for taxes and title thereto acquired by the county or others, so that they no longer would constitute a source of income for the payment of appellants' bonds. Without such information the widely scattered bondholders were helpless, and the data required was only such as the city should have kept in its records in order to properly discharge its duties as trustee for the bondholders.

The bonds recite (R. 27) that all things required to be done by the city to make them valid obligations had been done and performed, and,

> "that the cost and expenses of the said improvements which this bond has been issued to pay have been duly levied and assessed as special taxes upon all of the lots, pieces and parcels of land in said Local Sidewalk and Curb Improvement District No. 38, separately and in addition to all other taxes, and said special assessments are a lien upon said lots, pieces and parcels of land; that due provision has been made for the collection of said special assessments, together with interest

> on unpaid installments at the rate of 7% per annum sufficient to pay the interest thereon promptly when and as the same falls due, and also to discharge the principal hereof at maturity."

The city should accordingly be charged with the amount required to pay the bonds and interest, and it should be credited with: (a) the amount paid on principal and interest; (b) the amount legally levied and assessed but which could not be collected by and according to the machinery or procedure provided by law for the collection of such assessments.

The accounts rendered are so indefinite and uncertain as to the assessments made; the procedure followed in the collection thereof, and as to the amount actually collected and diverted to other purposes that no credit can be allowed except for what has been paid to the bondholders.

We concede that if the city followed the law in the making of the annual levies of assessments and in the collection thereof, it would not be liable for the failure of taxpayers to pay their taxes, and with that showing it would need to account only for the amount actually received from the taxes which it was required to levy, assess and collect under the procedure prescribed by statute.

If the city, in its account, could show losses resulting without any fault or neglect on its part because of the failure of taxpayers to pay, and because the lots assessed could not be sold for enough to yield the amount of the assessment against them, it would be entitled to credit for such losses, but the accounts

furnished were so inadequate and incomplete that it was impossible to determine therefrom whether it had taken any lawful step to carry out the duties imposed upon it as trustee, and to what credits it would be entitled. In support of this statement we need only refer to the reports furnished (R. 79-94) and to the comments of the city's accountants on the condition of its books (R. 67-79). See also the Findings of Fact (R. 56-57).

III

Errors in Decision of Trial Court

What we consider as the errors in the decision of the District Court may be classified into three parts:

a) Failure to render judgment for appellants for the full amount claimed, in view of the failure of the city to make a proper account showing that it was entitled to any credits, except for what had actually been paid to the bondholders.

b) Refusing to require the city to reimburse the trust fund by the excess payments made to certain bondholders whose bonds had been paid in full when it was obvious that the trust fund was insolvent.

c) Failing to allow the items claimed in excess of $6,846.17—the amount of the judgment rendered.

We shall now direct our attention to the first assignment of error, which reads as follows (R. 98):

> "That the Court erred in not holding and deciding that plaintiffs were entitled to judgment for the principal amount of the bonds held by said plaintiffs, to-wit: $37,000.00, with interest thereon

at the rate of 7% per annum from the 1st day of January, 1932."

The findings of fact (R. 54-62) are reasonably full, but the conclusions of the Court are based on the erroneous theory that losses to the trust fund, not clearly shown as having resulted from the wrongful acts of the city or its officers or employees, should not be charged against the city. Either consciously or unconsciously, the Court threw the burden of proof upon appellants, while we think according to well-established principles the burden was on appellees.

Before discussing the burden of proof, we wish to call attention to some of the facts found by the Court:

a) That losses resulted from the failure of the city to keep accurate records and because of the negligent, careless and inefficient manner in which the books and records of the city were kept (R. 57);

b) That the principal amount of bonds issued was $56,539.10, but that the amount actually levied for payment of principal was only $56,493.62, leaving a deficit in the levy for payment of principal of $45.48 (R. 57);

c) That the amount paid for interest on bonds was $31,932.88 (R. 57 and 59);

d) That the amount *levied* for payment of interest was only $21,750.25 (total of the interest column, R. 58 and 59, also shown on Exhibit A attached to appellees' Second Supplemental Report, R. 94), thus leaving a deficit in the interest fund of $10,182.63;

e) That instead of redeeming bonds to the principal amount of $5,649.36 each year commencing with

the close of the year 1922, as proposed in the financial set-up on which the assessments were based (R. 58) and bonds issued, the city actually redeemed (R. 59) only $2,039.10 in 1923, $2,500 in 1924, $4,500 in 1925, $3,000 in 1926, $3,000 in 1927, none in 1928, $1,500 in 1929, $2,000 in 1930, and $1,000 in 1931, or a total of $19,539.10 during the period in which it should have redeemed—according to its assessment schedule—$56,539.10.

From the Court's findings and the reports and accounts filed by appellees, the following conclusions are inevitable: That the records kept by the city were so inaccurate, inadequate, or obviously false that the diversions and misappropriations of the fund could not be correctly ascertained; or, *that the fund was insolvent from the beginning.*

A.

The Burden of Proof Was on the Trustee

At the opening of the trial counsel for appellants called to the Court's attention the insufficiency of the reports or accounts which appellees had furnished. Among other things, counsel said:

> "* * * In regard to these reports plaintiffs complain and show that the defendants have failed to comply with the orders of this Court requiring them to make a full and true account of the acts of Boise City as statutory trustee for the bondholders of Local Sidewalk and Curb Improvement District No. 38; that the reports sub-

> mitted by the defendants are in many instances evasive, conflicting and inconsistent, and the first two reports purport to be based upon, or made from, information or data contained in the audit of Lybrand, Ross Brothers & Montgomery, certified public accountants, but the report or audit of said certified public accountants has not been submitted or filed in this cause, so that the correctness of the partial and incomplete report submitted by the defendants can be verified or checked, or the correctness thereof determined by this Court; * * *"

Counsel further stated his understanding of the law of accounting in cases of this kind, and that the burden of proof was on appellees.

Thereupon the trial proceeded as set forth in the record (pp. 66-94).

In 65 C.J., page 904, the rule is stated as follows:

> "(§ 799) d. *Evidence.*—(1) *Presumptions and burden of proof.* In an action for an accounting against a trustee, plaintiff has the burden of proving the existence of a trust, and, ordinarily, the receipt by the trustee of some property impressed with the trust, and, under some circumstances, the amount of the property so received. After such facts going to make out the existence of the duty to account have been proved by plaintiff, the burden is then on the trustee to make or prove a proper and satisfactory accounting of the funds coming into his hands; so, if he claims allowances

or credits; he must prove them. If he does not do so, every intendment is against him; and every item of charge or credit whose correctness the trustees do not support by satisfactory evidence must be disallowed. Similarly, if circumstances showing waiver or estoppel are pleaded as a defense, the trustee has the burden of proving them. It is not necessary for plaintiff, in order to maintain the suit, to show affirmatively that there has been a failure to account for money or property belonging to him, or even that anything will be found due on the accounting, nor to prove negatively a failure of the trustee to perform his duty to account; and he is not under the burden of disproving the items of the account presented.

"*Matters of Discharge* set up by the trustees as a defense to the action in whole or in part must be proved by them. Thus, when payment is relied on, it must be shown; where it is shown that a trust has existed and there has been no settlement thereof during the life of the trust, the beneficiaries are prima facie entitled to an accounting; the presumption is that they have not been paid, and the fact that the trustee has expressly so declared as to some of them does not affect the force of the presumption as to others not mentioned in such declaration. Similarly, when a trustee seeks to convert the trust funds or a portion thereof in his hands into an ordinary debt, or a loan from his cestui que trust to himself, he must do so by clear and satisfactory evi-

dence; the presumptions are all against him, and the burden of showing good faith in the transaction is on him."

In 3 Pomeroy's Equity Jurisprudence (4th Ed.), Sec. 1063, the author says:

"*The Duty to Account.*—As a branch of the general obligation of carrying the trust into execution, a trustee is also bound to act for all the trust property. He must not only render a full account of his conduct at the time of final settlement, but it is one of his most imperative duties to keep regular and accurate accounts during the whole course of the trust of all property coming into, passing out of, or remaining in his hands. These accounts must clearly distinguish between the trust property and his own individual assets; for the two should never be mingled in the accounts nor in use; they should show all receipts and payments, and should at all times be open to the inspection, and produced at the demand of the beneficiary."

In the notes to the above section, the author cites authorities in support of the following statements:

(a) Failure to keep full or accurate accounts raises all presumptions against the trustee; it may subject him to pecuniary loss by rendering him liable to pay interest, or chargeable with moneys received and not duly accounted for.

(b) If the trustee negligently fails to keep true account, or fails to account, all presumptions are against him.

(c) The trustee must keep strict and accurate account and the burden is on him to show the amount of receipts and expenditures.

(d) Where the account has been kept in a negligent manner the presumption will be against the trustee on settlement.

(e) As a general rule, where the omission of the trustee to account is due to mere negligence without any actual intent to defraud, simple interest is allowed the cestui que trust, on the trust funds; but if the omission is wilful, compound interest is allowed.

The early English case (1808) of Lupton vs. White, 15 Ves. 432, is frequently cited by the authorities on the responsibility that rests on a trustee to make full and accurate accounts. In that case the Lord Chancellor, in discussing the right of plaintiff to an accounting and the fullness of the account, says:

"If a man by his own tortious act makes it impossible for another to ascertain the value of his property, and that in a transaction, in which the former was, not merely under an implied moral obligation, but pledged by solemn undertaking in a court of justice, that such should not be the state of things between them, by those means preventing the guard, which the court would have effectually interposed, is the argument to be entered, that,

if the party, so injured, can not distinguish his property, therefore he shall have nothing? That is not the law of this country; as administered in courts either of law or of equity. * * *

"A principle, not dissimilar, though not precisely the same, governed me in the case of Mr. Jackson's executors. There was no more duty imposed upon him than upon these individuals. He had kept the account, and, as it appeared to me, not incorrectly, upon his own side; but, having kept it only upon his own, though bound to keep it upon the other side, it was held, that he could not maintain a demand, to which under the circumstances he would have been fairly entitled. The decision was made, not upon the notion that strict justice was done, but upon this, that it was the only justice that could be done; and that no more could be done was the fault of Jackson himself; who, if he did not enable those parties to know, what demand they had upon him, could not be heard to say, he had any demand upon them."

In 4 Bogert on "Trusts and Trustees," Section 962, the author says:

"§ 962. *Duty to Keep Records.*

"It is the duty of the trustee to keep full, accurate, and orderly records of the status of the trust administration and of all acts thereunder. He can not comply with his duty to furnish informal information to the cestui, or with his duty to give

a formal statement of trust affairs on an accounting proceeding, without laying a foundation therefor by setting up a bookkeeping system and preserving receipts or vouchers and other similar documents.

"'To keep an accurate account is one of the primary duties of a trustee.' 'The general rule of law applicable to a trustee burdens him with the duty of showing that the account which he renders and the expenditures which he claims to have made were correct, just and necessary. * * * He is bound to keep clear and accurate accounts, and if he does not the presumptions are all against him, obscurities and doubts being resolved adversely to him.' This common-law duty is sometimes restated in statutory form. * * *

"* * * No trustee should rely on scattered informal notes, as in the case of entries in a diary.

* * * * * * *

"The principal penalty usually stated to apply to a trustee who fails to keep proper records of his trust is that 'all presumptions are against him' on his accounting, or that 'all doubts on the accounting are resolved against him.' He has the burden of showing on the accounting how much principal and income he has received and from whom, how much disbursed and to whom, and what is on hand at the time. If he claims that he received less than the cestuis allege he received, and has no written records to back his claim due to his own faulty system of keeping

accounts, the court will be strongly inclined to charge him with the sum he is alleged to have received. If he claims that he made payments to creditors or cestuis, these disbursements are disputed, and the trustee has no written evidence to substantiate his position due to a faulty record system, the court will tend to disallow the item. Had the trustee performed his duty by taking receipts or vouchers, he could have made a clear case for the disbursements. His failure to present such evidence casts suspicion on the claim and renders the court unwilling to hold that he has borne the burden of proving the payment by a preponderance of the evidence.

* * * * * * *

"If the trustee claims that he kept an account book but that he has lost it, it has been held that he must bear the burden of proving the payments which he alleges were shown by the book, and that doubts will be resolved against him. In one case where the trustee intentionally destroyed books and papers which he claimed showed expenditures, the court allowed him nothing on account of the alleged disbursements."

And in Section 963, Mr. Bogert says:

"§ 963. *Duty to Render Formal Account in Court of Equity.*

"The trustee also owes his cestui *a duty to render at* suitable intervals and *at the end of the*

trust a formal and detailed account of his receipts, disbursements, and property on hand, from which the beneficiary can learn whether the trustee has performed his trust and what the present status of the trust property then is. The trustee can be compelled by the court of chancery to perform this duty by presenting an account in that court, where it can be subject to the scrutiny of the court and its officers, as well as to criticism by the cestui and other interested parties. * * *

"In order to succeed in such a suit for accounting, it is not necessary that the cestui allege that there is any sum immediately due him under the trust, or that the trustee is in default. *The suit is one to obtain information concerning the course of administration, no matter what the present status is.*" (Our *italics.*)

To the same effect are the rules adopted by the American Law Institute and set out in the "Restatement of the Laws of Trusts," see particularly Sections 172 and 173, Volume 1. In Section 172, the text says:

"The trustee is under a duty to the beneficiary to keep and render clear and accurate accounts with respect to the administration of the trust. * * *

"If the trustee fails to keep proper accounts, he is liable for any loss or expense resulting from his failure to keep proper accounts. *The burden of proof is upon the trustee to show that he is entitled to the credits he claims, and his failure to keep*

proper accounts and vouchers may result in his failure to establish the credits he claims." (Our italics.)

The subject is discussed and the foregoing rules applied by the Supreme Court of California in Bone vs. Hayes, 159 Cal. 759, 99 Pac. 172. The Court there says:

> "Trustees are under an obligation to render to their beneficiaries a full account of all their dealings with the trust fund (3 Pom. Eq. Jur. § 1063; 28 Am. & Eng. Ency. L [2d Ed.]) 1076), and where there has been a negligent failure to keep true accounts, or a refusal to account, all presumptions will be against the trustee upon a settlement (Lupton vs. White, 15 Ves. 432, 440; Blauvelt vs. Ackerman, 23 N.J. Eq. 495; Landis vs. Scott, 32 Pa. 495)."

In the later case of Purdy vs. Johnson, 174 Cal. 521, 163 Pac. 893, the Supreme Court of California comments more at length on the procedure and burden of proof in cases of accounting by trustees. After quoting with approval the statements set out above from Bone vs. Hayes, the Court says:

> "(3) The entire trial was conducted upon the erroneous theory that the burden of proof was upon the beneficiary to point out the particulars in which the account was erroneous, and that she was bound to go forward and establish affirma-

tively the impropriety of the charges and credits which she assailed. Such is not the law."

The Court then refers to the proof in the case and the argument on the part of the trustees and then adds:

"The fault in this argument is that which we have already mentioned as permeating the entire proceeding, viz.: that it is assumed that the burden is upon the beneficiary to disprove the correctness of items in the account, whereas, in fact, the burden is upon the trustees to prove that charges made by them are proper."

The Court then refers to the fact that the case had to be remanded for the taking of a new account, either by the Court or by reference, and then adds:

"But whichever mode is followed, the account should be stated in accordance with the rules to which we have adverted, i.e., that it is the duty of the trustees to support every item of their account, and that, wherever they fail to support the correctness of a charge or a credit by satisfactory evidence, the item must be disallowed. *It is probable that, upon any such settlement of the account, these trustees will be compelled to forego repayment of sums which they have properly and in good faith expended for the trust, and that they will be charged as having received money in cases where they have not, in fact, received it, and could not with reasonable diligence have received it. But, if this be the*

result, it will follow from the failure and neglect of the trustees to perform their duty of keeping full and accurate accounts of their transactions. Their good faith can not save them from the consequences of this neglect. Whatever doubts arise from their failure to keep proper records or their inability to establish the items of their accounts must be resolved against them." (Our italics.)

B.

Analyses of Reports and Accounts Furnished by Boise City

That it was impossible to obtain a correct account from the fragmentary, incomplete, and untrustworthy, and in many instances absolutely false records kept by the defaulting City Clerk is clearly apparent from the report made by Lybrand, Ross Brothers and Montgomery, who in 1934, at an expense to the city of over $30,000 (R. 35), audited the books of the city for the period that the bonds were outstanding. Pertinent excerpts from this report were admitted in evidence and are set out in the record (R. 67-78).

Appellees' first report dealt entirely with generalities and lump-sum figures (R. 79-83). The second or supplemental report (R. 84-93), made pursuant to appellant's motion for a fuller report (R. 40), attempts to make a break-down of the amounts stated in the first report (R. 82) of $2,242.92 admitted as embezzled by the city clerk, and of the item of $800.11 which the city's accountants reported as being noted as "unpaid and overdue" on the city's books but not certified

as delinquent to Ada County (R. 78). Also the item of $353.16 which the accountants reported as "shown paid on rolls in excess of amounts of duplicate receipts" (R. 78).

The second or supplemental report also attempts to furnish partial and fragmentary information as to the present status of delinquent assessments which had been certified to the county for collection. The report claims appellees could furnish that information for only the years 1928, 1929, 1930, and 1931. The "grand total" of these delinquencies is shown on page 90 as amounting to $9,732.68.

The Second Supplemental Report (R. 90-94) is a reclassification of items contained in the first report, with a break-down (Exhibit "A," R. 94) of the annual assessments, annual certifications to the county and annual payments to bondholders of principal and interest.

Exhibit A (p. 94) deserves more than passing notice. It shows that the city made its set-up on the assumption that one-tenth of the entire bond issue (less $45.48, for which no levy was ever made) would be paid on January 1 of each calendar year commencing January 1, 1923, and that the interest levied could be reduced accordingly. This assumption was without any basis of fact to sustain it. On the lower part of Exhibit A will be found the date on which payments were made for the redemption of bonds and the amount of bonds redeemed annually. Obviously, as bonds were not redeemed they continued to bear interest. The actual maturity of all bonds was January

1, 1932, but they were payable "on or before." Any delay in the redemption of bonds would increase the amount required for interest and thus create a deficit in the trust fund unless the assessments were increased accordingly.

Reverting again to the schedule on the upper part of Exhibit A, we see that the delinquency in the collection of assessments in the first year was over 58%. In the second year it was slightly under 50%; in the third year, over 55%, and it rose to about 80% in 1930. These distressing delinquencies during a period of prosperity apparently gave no concern to the trustee who applied the meager collections to the redemption of bonds at par and ignored the obvious fact that there would be no funds with which to pay the remaining bonds.

Attention is called to the column headed "Penalty." Under Sec. 49-156, Idaho Code Annotated, set out in the Appendix to this brief, a penalty of 10% was required to be added when an assessment became delinquent. It will be noted that in no case was the penalty added actually 10% of the delinquency. We note also that after 1925 no penalty whatsoever was added, although the same statute continued in force and effect.

The column headed "Certified to County" should be the sum of the penalty and delinquency, but in no case does it correspond. In some cases it is larger and in some cases less than the sum of the preceding two columns.

After the city discontinued adding penalties, the

amount of the delinquency in no case corresponds to the amount certified to the county. Sometimes it certified more than was delinquent, and sometimes less.

The 10% penalty that was not added to the delinquencies certified to the county aggregated $2,698.87. The failure of the city to add the penalty was a direct violation of the statutes, and for that amount the city is liable.

The errors in the amount certified to the county are of such character that on the face of the reports and accounts made by the city they might invalidate the assessments and be a contributing cause to the failure of taxpayers to pay.

In discussing tax penalties the Circuit Court of Appeals for the Eighth Circuit, in Ritterbusch vs. Atchison T. & S.F. Ry. Co., 198 Fed. 46, 53, said:

> "One who would enforce a penalty for the failure to pay a claim must demand the true amount. If he demands a larger amount no penalty is incurred."

To the same effect is the decision of the Court in State vs. Superior Court, 93 Wash. 433, 161 Pac. 77.

Clearly the county treasurer had no authority under the law to change the amount of the tax to be collected. The treasurer was charged with the duty of collecting what the city certified, and if a taxpayer tendered less the county treasurer would be compelled to refuse acceptance of the tender and there could be

no valid sale for the failure of the taxpayer to pay an illegal exaction if he had tendered the correct amount.

In view of the reports rendered and the absolute impossibility of reconciling the facts and figures contained in the reports; and in view of the condition of city's records as shown by the reports filed by appellees and by the report of the city's accountants, we respectfully contend that the city has failed to sustain the burden of proof; that it has failed to show by trustworthy proof that it is entitled to credit for the amounts for which it has failed to account and for which it in effect claims it can not account because of the condition of its records.

It is obvious from Exhibit A that there was neglect in the prompt application of funds to the payment of bonds. Only twice were bonds paid in January, and then only a thousand dollars at a time. Payments were usually made in July, and once as late as September. These delays resulted in increasing the interest payments, which, because of the delay in making redemptions aggregated, according to the reports, $10,034.14 more than the interest would have amounted to if the bonds had been redeemed promptly on the first of January as contemplated by the schedule.

We therefore contend that the Court should have entered judgment against the city for the full amount of the bonds outstanding, and interest thereon from January 1, 1932.

A very full review of the authorities noting changes in decisions and statutes will be found in the recent decision of the Supreme Court of Wyoming, in the

case of Henning vs. City of Casper, 50 Wyo. 1; 57 Pac. (2d) 1264.

C.

Interest on Funds Diverted

Incidentally we desire to call attention to the failure of the District Court to require the city to pay interest on the funds which it had wrongfully diverted, and which, according to the Trial Court's decision, aggregated about $4,000. The money diverted should have been placed in the trust fund from 5 to 15 years prior to the judgment of the District Court.

That appellant is entitled to interest at the legal rate of 6% per annum on the money diverted seems obvious. Authorities on this proposition are cited in paragraph 11 of our Summary of the Argument.

D.

Assignment of Error No. V

This assignment, like assignment No. 1, deals with the failure of the Court to allow numerous items involved in the accounting. What has been said above with reference to assignment No. 1 applies to assignment No. V, which reads as follows:

> "That the Court erred in holding and deciding that plaintiffs were entitled to judgment against defendant Boise City only for the sum of $6,-846.17 * * *" (R. 99).

E.

When an Improvement District or the Fund for the Payment of the Bonds Is Insolvent, Prorata Payment Must Be Made to All Bondholders.

Assignments of Error Nos. II, III, and IV (R. 98-99) all relate to the same error which is fully stated in assignment No. II, as follows:

> "That the Court erred in not holding and deciding that the defendant, Boise City, had failed to comply with the provisions of Section 49-2725, Idaho Code Annotated 1932, which provides in substance and effect that all bonds of Local Sidewalk and Curb Improvement District No. 38 of Boise City were equal liens upon the property for the assessments represented by such bonds, without priority of one over another, and in not holding that all collections made under such assessments should have been paid and applied pro rata on all bonds issued, to-wit: $56,539.10, and in not holding that said Boise City and its officers had wrongfully and in violation of law, redeemed and paid at par $19,539.10 of said bonds, with interest to date of redemption."

Sec. 49-2725, Idaho Code Annotated, provides in the last paragraph thereof that "and such bonds shall be *equal liens* upon the property for the assessments represented by such bonds *without priority of one over another* to the extent of the several assessments against the several lots and parcels of land" (our italics).

In Meyers vs. Idaho Falls, 52 Idaho 81, 11 Pac. (2d) 626, the Court considered the above section and the provisions of Sec. 49-2723, which provides in substance that bonds shall be paid in their numerical order. In that case the bonds had all matured, but that did not change the lien of the bondholders and their rights under Sec. 49-2725. The Court held that Sec. 49-2723 was not mandatory but directory only. It said:

> "Under the acts which we are considering, the bonds are all issued on the same date and they mature on the same date. The equality clause would under such circumstances apply in the absence of an express prohibition, and being expressly enacted in the same act, it would be a broad assumption to say that by mere numbering this claim is rendered entirely nugatory.
>
> "Both the equality clause and the numerical priority clause will be given effect by holding that the latter is directory only. We believe that the legislature only intended by the numerical priority clause to provide an orderly method of retiring the bonds, and for the stoppage of interest, and that it did not thereby intend to destroy the equal, joint estate of all of the bondholders in the lien of the bonds" (pp. 95-96).

That decision is in harmony with the general equity rule that "Equality is equity." The general rule on the subject is well stated in 1 Jones on Bonds and Bond Securities, Sec. 511. The author distinguishes

clearly between securities payable from an *inexhaustible power of taxation,* under which the fund may be replenished to pay all bonds, and bonds payable under a taxing *power* which is *limited and exhaustible.* In the former case, it is said the payment of a claim in full would not constitute a preference and would not prejudice the rights of the other creditors because the fund may be replenished, but in the latter case the fund can not be replenished and the bondholders should therefore share pro rata in the security and in the fund.

Trustees under private bond issues instantly come to attention when any default occurs which may prevent the payment of all bonds and interest in full. The rule is well stated by the Supreme Court of Washington in Welch vs. Northern Bank & Trust Company, 170 Pac. 1029. It is there said:

> "* * * So long as no active duty is demanded of the trustee, the trust is no more than nominal, but if by the terms of the trust deed the trustee engages to do something (hold property) for the benefit of those who buy bonds, the trust is from its inception an active trust as distinguished from a dry or passive trust.
>
> "'When trustees have accepted the office, they ought to bear in mind that the law knows no such person as a passive trustee, and that they can not sleep upon their trust. The trustee should make himself acquainted with the nature and circumstances of the property; for, though he is not responsible for anything that happens before his

acceptance of the trust, yet if a loss occurs from any want of attention, he may be held responsible for not taking such action as was called for.' Perry on Trusts and Trustees, Sec. 266."

Under the Idaho statute (Sec. 49-2725) every bond issued was an *equal* lien, not only on the funds in the hands of the treasurer but "upon the property for the assessments represented by such bonds * * * to the extent of the several assessments against the several lots and parcels of land."

One hundred thirteen bonds were issued—112 of the par value of $500 each and one of the par value of $539.10. The assessments were for the equal benefit of all bonds. This was not a case of 113 separate liens with the last-numbered bond holding the 113th lien, but here the last-numbered bond was of equal rank with the first-numbered bond. The matter of rank is unimportant when the fund is ample to pay all bonds, but whenever it appears, as it did in the case at bar, that the fund was insolvent from the beginning, the city violated its obligation and duties as trustee by paying and continuing to pay the bonds in numerical order without regard to the fact that there would be no money with which to pay the bonds carrying the higher numbers.

We have heretofore referred to the fact that the amount of the levy made for payment of principal was $45.48 less than the total aggregate principal of the bonds outstanding (R. 57). That loss can not

legally be placed upon bond No. 113—where it would be placed if the city's order of payment be approved.

We have heretofore also referred to Exhibit A (R. 94) as showing that the delinquencies in collection of taxes varied from about 50% to 80% per year during the entire period. The instant there was any delinquency it was obvious that the accumulation of interest would exceed the fund provided for the payment thereof, as the bonds could not then be retired as promptly as contemplated by the adopted schedule.

It was clearly apparent to all who were in touch with the payment of taxes that the fund was insolvent and insufficient to pay all bonds in full with accrued interest. When that appeared the city was violating its obligations to the bondholders by continuing to pay certain bonds in full. That course would throw the entire loss upon the bondholders who held the higher-numbered bonds, and deprive them of their rights under the statute.

Cases from both the state and federal courts are cited in support of this proposition under paragraphs 8 and 9 of our "Summary of the Argument." Many of these decisions were made in the absence of any statute specifically providing that the bonds were equal liens on the assessments against the several pieces and parcels of land, and without priority of one over another.

In the case at bar, the power of a city to levy assessments for the payment of the bonds was limited and "exhaustible." There was no provisions in the statutes whereby the fund could be replenished by reassessments or additional levies. Each of the 113 bonds

had a 1/113th share or interest in every assessment made for principal and for interest, and in every dollar collected for the trust fund.

The city was without power to waive or sacrifice the bondholders' rights. It could pay bonds in numerical order only if the trust fund would be ample to pay all bonds in full.

In the state of Missouri, drainage districts organized prior to the late depression had limited taxing power. Assessments for the payment of bonds were apportioned according to benefits, as in the case of improvement districts. Delinquency in the payment of taxes created a situation similar to that in the case at bar. The Supreme Court of that state, in State vs. Little River Drainage District, 334 Mo. 753, 68 S.W. (2d) 671, 674, after calling attention to the fact that there was no inexhaustible fund for the payment of the bonds, and while the law contemplated that the bonds and coupons should be paid as they matured out of moneys as collected, the Court held that when it appeared that the delinquencies were such as to create an insolvency in the fund, the treasurer of the district would not be permitted to pay bonds in full but would be required to make payment pro rata on all bonds. Among other things the court said:

> "* * * The bonds are payable solely out of special taxes levied against benefit assessments initially charged on the various tracts of land in the district, and as to each tract the tax can not exceed the benefit assessments standing thereagainst. If the tax returns within these limits

are and will be insufficient to pay all bonds and interest in full, the district is in legal effect insolvent.

"Second, though the limitations imposed by the article on the taxing power of the district are such as may reduce it to a state of insolvency, nevertheless the statute makes no provision for preference of priority between bonds or bondholders, but, on the contrary, pledges the taxes collected to the payment of *all* the bonds sold, with interest."

Again the Court said:

"Considering together the three groups of provisions reviewed in the preceding paragraphs, we are clearly of the opinion that performance of the requirements of section 10788 (Mo. St. Ann., §10788, p. 3515) with reference to the payment in full of bonds and coupons as they mature is contingent on whether the drainage district is solvent—or, in other words, *on whether there are and will be, so far as appears,* sufficient tax revenues to pay all bonds and coupons in full. The section *assumes* the solvency of the district and on that basis provides for disbursements from time to time out of the bond fund to pay matured bonds and interest; and the fund is replenished by successive subsequent tax installments paid in. To that extent matured and next maturing bonds and interest have a prior claim on the fund at any given time. But that does not mean the

fund is not held in trust for the benefit of all the bonds. The matured bonds are entitled to be paid in full *because* those of later maturity in their turn will be. * * *

"The very reasons which require the payment in full of bonds and coupons of the drainage district as they come due, so long as the district is solvent, would require that they be paid only ratably if the district becomes insolvent. By no other means can all the provisions of the article be harmonized and the parity of claim of all the bonds enforced" (our italics).

Again, in State vs. Duncan, 334 Mo. 733, 68 S.W. (2d) 679, 683, the same Court, dealing with the Missouri drainage acts, said:

"There is no more reason for saying one matured bond should be preferred over others in its class and be paid in full when the fund is insufficient to pay all, *than there is for contending it should be paid in full when the district is insolvent.* True, if the district is not insolvent, this trust fund can be replenished; but that does not justify a diversion of the fund to the full payment of particular matured bonds when other bonds having an equal claim thereon are thereby forced further to abide future collections and eventualities.

"* * * All matured bonds should share *ratably* in the fund as it stands and *likewise in replenishments thereof.* In that way all will be paid in full without discrimination or chance of

miscarriage, receiving interest to the date of payment if the bonds so provide.

"The statute gives them no rights beyond that. It contemplates, of course, that all bonds, and therefore each particular bond, shall be paid in full, but above that it requires equality." (Our italics.)

To the same effect are the recent decisions in Norfolk & W. Ry. Co. vs. Board of Education, 14 F. Supp. 475, and Board of Education vs. Norfolk and W. Ry. Co. (C.C.A. 7), 88 Fed. 462.

If the rule contended for be applied to the case at bar, appellants would be entitled to about 46⅔% of the face value of their bonds instead of 18½%. Converted into money, it would amount to $10,240 more than what appellants were allowed by the District Court. If the city paid to certain bondholders more than they were entitled to under the law, then it is liable for the difference between the amount they were paid and the amount they should have been paid, and appellants' judgment should be increased by the amount stated above.

It may be urged that the bondholders should have stood watch over the treasurer's office and promptly enjoined him from overpaying any bondholder. We submit that such argument is without merit. A trustee can not escape the consequences of his wrongful acts by the mere contention that the beneficiaries should have enjoined him from doing what he had no right to do, and that failing to do so, they can not complain

after he has dissipated the assets or funds of his trust.

The bondholders in the case at bar, as usual, were widely scattered throughout the Union. Some owned but one or two bonds, some more, and the law does not cast upon each one of them the burden of standing watch over the trust fund and to see that the statutory trustee performs duties imposed on it by law. On that theory bonds could never be sold or money borrowed for public improvements or municipal purposes.

IV

Right of Bondholders to Foreclose the Lien Against the Several Pieces and Parcels of Land Is an Impracticable Remedy and Optional with the Bondholders.

Section 49-2709 provides for the city foreclosing the lien of assessments, and Section 49-2725 provides that: "if the municipality shall fail, neglect or refuse to pay said bonds, or to promptly collect any of such assessments when due, the owner of any such bonds may proceed in his own name to collect such assessments and foreclose any lien thereon in any court of competent jurisdiction, * * *."

The right of a bondholder to bring suit to foreclose such lien is clearly optional. Where all the bonds are held by one party, as is often the case where a contractor takes the bonds in payment for the improvements, that remedy may be practicable, but where several hundred bonds are sold to bondholders scattered throughout the country, the privilege extended by the statute is wholly impracticable.

Under the statute every bond is a lien against each tract of land, and the holder of one bond out of 113 could only collect 1/113th part of the assessment on any one tract.

If the bonds should be held to be liens according to their numerical order, then the foreclosing bondholder would presumably have to make the other bondholders parties defendant to the suit. The expense of title examination, the expense of bringing suit and determining the necessary parties and pro rating the fund collected, are insurmountable obstacles to the remedy of foreclosure by individual and widely scattered bondholders. Clearly no bondholder would be permitted to collect, in any event, more than his pro rata share of the assessment; he would have no authority to pro rate the funds among the other bondholders or act as their agent or representative. Both the city as trustee for all bondholders and the lot owner would presumably object to the money being paid to any one except the city treasurer, so that it could be disbursed according to law upon surrender of the bonds and coupons.

We submit, therefore, that appellants were not required to exercise the right of foreclosure, and that the city can not escape liability for its wrongful acts on the plea that the bondholders should have enjoined it from violating the law, or that, when the city failed to do its duty, the bondholders should have foreclosed their liens and by such procedure protected themselves against the losses that would otherwise result from the negligent and wrongful acts of the city and its officers.

In conclusion, the entire record is now before this Honorable Court. In its last report or account appellees said (R. 93):

> "With the matters furnished herein, Boise City has furnished all of the facts pertaining to said Local Sidewalk and Curb Improvement District No. 38, that it is possible for it to furnish."

It would seem, therefore, that there can be no occasion for remanding the cause back to the District Court for further hearing, and we accordingly submit that this Court should direct the judgment to be entered, based upon the facts before it.

Respectfully submitted,

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October 19, 1938.

APPENDIX

Statutes of Idaho Deemed Pertinent to the Issues Involved

(Sections are of Idaho Code Annotated, 1932)

From Chapter 1, Title 49, relating to cities of the first class:

SEC. 49-156. *Finances—Collection of special assessments—Duty of city clerk.*—The city clerk of such city shall collect special assessments levied therein of whatsoever kind or nature, and shall give public notice in at least three consecutive issues of the official paper of said city, ten days before said assessments become due, which notice shall state the time for payment to begin and the time for payment to close, and that ten per cent penalty will be added after delinquency; and shall also mail a postal card to each property owner containing the substance of said notice; and any property owner may redeem his property from said assessment by paying the principal thereof with accrued interest within the time specified in said notice, and in default of such payment the same shall become delinquent and a penalty of ten per cent shall be added.

SEC. 49-157. *Collection of special assessments—Certification of delinquencies to tax collector.*—All such delinquent assessments, together with the penalty, shall be certified to the tax collector of the county by the city clerk and placed upon the tax roll and collected in the same manner and subject to the same penalties as other city taxes: provided, that the provisions of this and the next

preceding section shall apply to all special assessments levied in any city to which the provisions of this chapter are made applicable, or which shall be organized under this chapter, whether such special assessment was levied prior to or after the passage of this chapter, or the organization of any city hereunder.

From Chapter 27, Title 49, relating to local improvement districts organized prior to March 15, 1927:

SEC. 49-2702. *Bases of assessments.*—The assessment of the cost and expense or any work or improvement * * * shall be assessed upon the abutting, contiguous and tributary lots and lands, and lots and lands included in the improvement district formed, each lot and parcel of land being separately assessed for the full debt thereof in proportion to the number of feet of such lands and lots * * * and in proportion to the benefits derived to such property by said improvement sufficient to cover the total cost and expense of the work to the center of the street.

SEC. 49-2709. *Lien of assessment—Foreclosure.* —Whenever any expense or cost of work shall have been assessed on any land the amount of said expenses shall become a lien upon said lands, which shall take precedence of all other liens, and which may be foreclosed in accordance with the provisions of the Code of Civil Procedure.

Such suit shall be in the name of the city of ..... (naming it) as plaintiff, and in any

such proceedings where the court trying the same shall be satisfied that the work has been done or material furnished, which, according to the true intent of this chapter, would be properly chargeable upon the lots or lands through or by which the street, alley or highway improved or repaired may pass, a recovery shall be permitted, or a charge enforced to the extent of the proper proportion of the value of the work or material which would be chargeable on such lot or land, notwithstanding any informalities, irregularities or defects in any of the proceedings of such municipal corporation or any of its officers.

SEC. 49-2710. *Assessment roll.*—Upon the passage of an ordinance as herein provided * * * the committee on streets, together with the city engineer * * * shall make out an assessment roll according to the provisions of said ordinance and shall certify the same to the council or trustees of such municipality.

SEC. 49-2715. *Special assessments for improvements—Collection.*—All such assessments shall be known as special assessments for improvements and shall be levied and collected as a separate tax, in addition to the taxes for general revenue purposes, to be placed on the tax roll for collection, subject to the same penalties and collected in the same manner as other municipal taxes.

SEC. 49-2716. *Bonds—Issuance to cover instalment payments.*—Whenever the mayor and council or trustees of any municipality shall, under author-

ity vested in them by any laws of this state, cause any street or avenue, or alley in such municipality, to be side-walked, graded, curbed, planked, graveled, paved, guttered, sprinkled, lighted, repaired, or macadamized, or any other local street improvements, provided for in section 3942 of Idaho Compiled Statutes and 49-1106 of Idaho Code, the cost and expense of which is chargeable to the abutting, adjoining, contiguous or approximate property, they may, in their discretion, provide for the payment of the costs and expenses thereof by instalments instead of levying the entire tax of special assessments for such costs at one time, and for such instalments they may issue, in the name of the municipality, improvement bonds of the district, which shall include the adjoining, contiguous, and approximate property liable to assessment for such local improvements payable in instalments of equal amount each year, which bonds shall, by their terms, be made payable on or before a date not to exceed ten years from and after the date of issue of such bonds, and shall bear interest not exceeding seven per cent per annum, number of years for said bonds to run and the rate of interest thereon, within said limits, in each instance to be determined by the city council or village trustees: * * *

SEC. 49-2719. *Annual tax levy for instalments and interest.*—When district bonds are issued under this chapter for improvements, the cost of which is by law charged by special assessment against specific property, the mayor and council,

or trustees, or other authorized officer, board or body, shall levy special assessments each year sufficient to redeem the instalment of such bonds next thereafter maturing, but in computing the amount of special assessments to be levied against each piece of property liable therefor, the interest due on said bonds at the maturity of the next instalment shall be included. Such assessment shall be made upon the property chargeable for the cost of such improvements, respectively, and shall be levied and collected in the same manner as may be provided by law for the levy and collection of special assessments for such improvements where no bonds are issued, except as otherwise provided by this section. But the basis of such assessment, whether upon such assessed valuation, frontage, or otherwise liable for such costs, shall be retained for the assessment of succeeding instalments of said bonds.

SEC. 49-2723. *Payment of bonds—Duties of treasurer.*—The funds arising by such assessments shall be applied solely toward the redemption of said bonds.

The city treasurer or other authorized officer of such municipality shall pay the interest on the bonds authorized to be issued by this chapter out of the respective local improvement funds from which they are payable. Whenever there shall be sufficient money in any local improvement fund against which bonds have been issued under the provisions of this chapter, over and

above the amount sufficient for the payment of interest on all unpaid bonds, to pay the principal of one or more bonds, the treasurer shall call in and pay such bonds, which shall be called and paid in their numerical order: provided, that such call shall be made by publication in the city official newspaper on the day following the delinquency of any instalment of the assessment or as soon thereafter as practicable and shall state that bonds No. ——— (giving the serial number or numbers of the bonds called) will be paid on the day the next interest coupons on said bonds shall become due, and interest upon said bonds shall cease upon such date.

SEC. 49-2725. *Bondholders' rights and remedies.* —Said bonds, when issued to the contractor constructing the improvements in payment thereof, or when sold as above provided, shall transfer to the contractor, or other owner or holder, all the right and interest of such municipality in and with respect to every such assessment, and the lien thereby created against the property of such owners assessed as shall have not availed themselves of the provisions of this chapter in regard to the redemption of their property as aforesaid, shall authorize said contractor and his assigns, and the owners and holders of said bonds to receive, sue for and collect, or have collected such assessment embraced in any such bond or through any of the methods provided by law for the collection of assessments for local improvements.

And if the municipality shall fail, neglect, or refuse to pay said bonds, or to promptly collect any of such assessments when due, the owner of any such bonds may proceed in his own name to collect such assessments and foreclose any lien thereon in any court of competent jurisdiction, and shall recover, in addition to the amount of such bonds and interest thereon, five per cent, together with costs of such suit, including a reasonable sum for attorney's fees.

Any number of the holders of such bonds for any single improvement may join as plaintiff, and any number of holders of the property on which the same are a lien may be joined as defendants in such suit.

And such bonds shall be equal liens upon the property for the assessments represented by such bonds without priority of one over another to the extent of the several assessments against the several lots and parcels of land.

49-2728. *Municipality Not Liable.*

(This section is set out in bond attached to plaintiffs' complaint as Exhibit "A" [R. 28].)